Nos. 90-201, 90-202, 90-205

Supreme Court, U.S.
FILED
NOV 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COLONIAL VILLAGE, INC., MOBIL LAND DEVELOPMENT CORPORATION, and MARVIN J. GERSTIN and MARVIN GERSTIN ASSOCIATES, INC.,
Petitioners,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider an interlocutory decision that the complaint was timely filed, when that decision directly followed this Court's timeliness decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and the issue has no implications beyond a very narrow group of Fair Housing Act cases?

2. Should this Court grant certiorari to consider an interlocutory decision that the complaint states a claim under the Fair Housing Act, when the longstanding regulations of the Department of Housing and Urban Development interpret the Act to support plaintiffs' claims and when there is no contrary circuit court precedent?

3. Should this Court grant certiorari to consider an interlocutory constitutional challenge to the Fair Housing Act when plaintiffs' claims were remanded for discovery and trial without any discussion of defendants' constitutional arguments, which were not emphasized by the defendants below and which have not yet been addressed by any appellate court?

4. Should this Court grant certiorari to consider an interlocutory challenge raising a host of fact-bound, procedural defenses to plaintiffs' claims, when the application of those defenses to the unique facts of this case has no general significance, and when those defenses may become moot after discovery and trial?

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REGULATORY PROVISIONS

Respondents supplement the omission from petitioners' briefs of the regulations of the United States Department of Housing and Urban Development, 24 C.F.R. Part 109, which provide in relevant part as follows:

Part 109—Fair Housing Advertising

* * * *

§ 109.25 Selective use of advertising media or content.

The selective use of advertising media or content when particular combinations thereof are used exclusively with respect to various housing developments or sites can lead to discriminatory results and may indicate a violation of the Fair Housing Act. Similarly, the selective use of human models in advertisements may have discriminatory impact. The following are examples of the selective use of advertisements which may be discriminatory:

* * * *

(c) Selective use of human models when conducting an advertising campaign. Selective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed at other groups. Another example may involve use of racially mixed models by a developer to advertise one development and not others.

§ 109.30 Fair Housing policy and practices.

* * * *

(b) Use of human models. Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of

race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondents [1] respectfully supplement petitioners' Statements Of The Case as follows:

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[1] The respondent fair housing organizations are non-profit corporations which have no parent or subsidiary affiliates.

1. Because of the procedural history of this case, the factual record is almost entirely undeveloped. The district court dismissed plaintiffs' claims at a very early stage of litigation, prior to any discovery. Less than a month after the complaints were served in November 1986, the defendants began filing motions to dismiss raising various threshold defenses. Before setting up a discovery schedule, the district court established a briefing schedule to resolve those preliminary motions. In addition to filing a substantive opposition, plaintiffs filed an affidavit pursuant to Federal Rule of Civil Procedure 56(f) specifying their obvious need to conduct discovery on the merits and articulating some of the facts they expected to adduce in support of their claims, including evidence of the full scope of defendants' racially exclusive advertising practices and "the intent and ill will of defendants in publishing all-white human model ad campaigns" despite "the longstanding HUD regulations warning against this type of advertising." The district court never considered that Rule 56(f) affidavit, however, because it ruled that plaintiffs' claims were time-barred under the statute of limitations and dismissed plaintiffs' claims on that narrow ground without reaching the merits. As a result, to this day most of the defendants have not filed an answer and plaintiffs have not had any discovery. Thus, the factual record is ill-suited to plenary review by this Court of the broad legal issues petitioners seek to raise on interlocutory review.

2. Because there has been no discovery, the full scope of defendants' racially exclusive advertising practices prior to May of 1986 has not yet been ascertained. Petitioner Colonial Village, Inc. ("Colonial") errs in suggesting that plaintiffs' case against Colonial is limited to the 31 all-white advertisements which it ran in 1985 and early 1986. *See, e.g.*, Colonial Village's Petition For A Writ of Certiorari at 5 (discussing only ads published during 1985 and 1986). The complaint was not so limited, but rather alleged that "not one of Colonial

Village's pictorial advertisements published prior to May 15, 1986, depicted a black human model, while a large number of white human models were portrayed in those same ads." Colonial Complaint at ¶ 9. On remand plaintiffs will seek to prove that Colonial Village's racially exclusive advertising dates back to at least 1983, involving many more all-white ads than Colonial currently admits. Similarly, the complaint against Marvin J. Gerstin and his advertising agency is not limited to advertisements published in 1985 and early 1986, but rather alleges that since 1973 those defendants continuously used racially exclusive advertising, and violated a 1976 Conciliation Agreement with the United States Department of Housing and Urban Development and one of the plaintiffs requiring integrated advertising. Gerstin Complaint at ¶¶ 10-15.

3. As the petitioners concede, their major argument in the district court did not concern the merits of plaintiffs' claims. Rather, they relied primarily on the affirmative defense that plaintiffs' Fair Housing Act claims should be dismissed under the statute of limitations because the defendants had ceased their racially exclusive advertising during the last 180 days before the filing of the complaint and the overall statistics for that period showed that defendants had begun to depict black persons in their ads. Plaintiffs did not dispute below that the defendants began integrating their ads for the first time after plaintiffs filed administrative complaints, but before settlement discussions ceased and plaintiffs were forced to file the federal complaints.[2] The defendants in-

[2] Although petitioners accuse plaintiffs of bringing these claims as part of a "profitable cottage industry of suing real estate developers, advertising agencies and newspapers" rather than for the vindication of civil rights, *see, e.g.*, Colonial Petition at 18 n.8, in fact before plaintiffs filed their complaints in federal court they offered to settle all their monetary claims in each of the two cases in which certiorari is now being sought, including attorneys' fees and costs, for $3,000 or less.

troduced no evidence contesting plaintiffs' allegations that defendants had engaged in a long, continuing practice of excluding black human models from their real estate advertising campaigns, dating back many years. Moreover, plaintiffs introduced an affidavit demonstrating that the defendants' racially exclusive advertising practices (i.e. defendants' *uninterrupted* stream of all-white advertisements) continued into the 180-day statute of limitations period by at least one day.[3]

4. In response to the defendants' statute of limitations defense, plaintiffs relied on this Court's controlling decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-381 (1982), which provides that a Fair Housing Act claim challenging a "continuing violation manifested in a number of incidents" is timely so long as the complaint is "filed within 180 days of the last asserted occurrence of that practice." Without even mentioning this Court's *Havens* decision or the plaintiffs' continuing violation theory, the district court held that "there was no conceivable violation by either defendant during any period not barred by the statute of limitations." App. at 39a. Inexplicably, the district court disregarded the undisputed evidence that "the last of the long stream of all white ads . . . occurred within the 180-day zone." App. at 20a. On appeal, the D.C. Circuit properly reversed the district court for failing to follow this Court's "last asserted occurrence" rule set out in *Havens* for applying the Fair Housing Act's statute of limitations to a complaint alleging a continuing violation. *Id.* Indeed, the court of appeals noted that the district court itself in a subsequent decision "appeared to recognize . . . that its initial time-bar decision bore reexamination." App. at 20a-21a n.9.

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[3] Both the district court and the court of appeals found in plaintiffs' favor on this fact issue. *See* 899 F.2d at 35, Appendix To Petitions (App.) at 20a-21a & n.9; App. at 32a-33a, 48a-49a.

5. Colonial erroneously asserts that its petition properly presents the legal issue whether discriminatory intent must be shown in order to state a claim under Section 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(c). Colonial Petition at 19. In fact, Colonial waived that issue in the court of appeals by arguing on appeal that "*The District Court Did Not Impose Any Requirement That Plaintiffs Prove Discriminatory Intent To Establish Their Claim Under Title VIII*" and thus that the issue whether plaintiffs' claim require proof of discriminatory intent was "irrelevant and unnecessary to the appeal." Brief for Defendants-Appellees Colonial Village, Inc. and Mobil Land Development Corporation at 20 (emphasis in original). Given its position before the D.C. Circuit that the issue of discriminatory intent was not reached by the district court and was otherwise irrelevant, it is improper for Colonial now to seek review by this Court on the ground that the district court held that "an element of discriminatory intent had to be proved in a section 804(c) action" and that the court of appeals purportedly erred by not affirming that holding. Colonial Petition at 10.

6. Colonial's petition for review of the statute of limitations issue relies heavily on a factual misstatement. Before this Court, Colonial argues *for the first time* that plaintiffs' claim is untimely because "[a]lthough an ad for Colonial picturing a white couple did appear in the newspaper on the 180th day before the complaint, that was simply the automatic consequence and effect of campaign planning and media placement decisions and arrangements that necessarily occurred prior to that date." Colonial Petition at 21; *id.* at 14 (same argument), 23 (same argument). In truth, Colonial never introduced any evidence below to support this factual assertion and never even raised this issue before either the district court or the court of appeals. Instead, it relied solely on the overall statistics concerning its advertising published within the 180-day limitations period as a whole.

7. Colonial's petition for review of the standing issue relies on factual misstatements. Colonial states that "the only basis for standing alleged by this plaintiff is that he was 'offended' by the real estate ads he saw in *The Washington Post* and 'incurred indignation' and 'distress' as a result." Colonial Petition at 25. To the contrary, the complaint also alleges that Mr. Spann "has been looking for housing in the District of Columbia metropolitan area during the period covered by this Complaint" and that as a result of Colonial's racially preferential ads he has been deprived of his right "to obtain housing on an equal basis with other persons regardless of race." Colonial Complaint at ¶¶ 4, 16. Colonial also baldly asserts that "as a long time resident of Washington, D.C. [Mr. Spann] does not claim to live in or near the neighborhood in which the project is located in Virginia." Colonial Petition at 25. Colonial's own ad, however, states the project is "Right next door to D.C. in Rosslyn." *Id.* at 4, 5. (Other Colonial ads have stated that the project is "just across the bridge from Georgetown" and that "it's only a minute from the Key Bridge" into D.C.).

8. Colonial waived below the right to argue to this Court that the court of appeals erred in its alternative holding that it " 'could not resolve' the individual plaintiff's standing without a remand permitting him to amend the complaint or to supplement the record in the district court." Colonial Petition at 27 n.13. Although Article III standing is a fundamental jurisdictional requirement that can never be waived by a party to the litigation, a party can waive objections to the discretionary decision of a court to postpone decision on standing pending further development of the record. *See generally Havens*, 455 U.S. at 377-378; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112-113 n.25 (1979). Before this Court, Colonial criticizes the court of appeals on the ground that the standing allegations in the complaint concerning Mr. Spann were allegedly "pat-

ently inadequate" to survive summary judgment and thus it was an abuse of discretion for the court of appeals to remand the standing issue. Colonial Petition at 28 n.13. The record shows, however, that Colonial did not move for summary judgment against Mr. Spann for lack of standing and in no way challenged Mr. Spann's standing before the district court or the court of appeals. As a result, Colonial has waived any objection to the court of appeal's decision that resolution of Mr. Spann's standing requires further development of the record. *Gladstone*, 441 U.S. at 113 n.25.

9. Mobil Land Development Corporation ("Mobil Land") seeks certiorari review of an alleged "decision of the court of appeals . . . allow[ing] the assertion of federal jurisdiction, without service of process ever having been made directly upon MLDC and without any showing that such service was even authorized by statute or rule, simply on the grounds that service was made on [Mobil Land's] co-defendant subsidiary." Mobil Land Petition at 17-18 (footnote omitted). In fact, the court of appeals entered no such ruling. Rather, the Court concluded that the record was too "thin" to allow the Court to "review intelligently" the issue, and remanded to the district court for further proceedings on the question. App. at 18a. The court of appeals noted the plaintiffs had requested an opportunity below for discovery of Mobil Land on the service issue, *id.* n.5, and left it to the district court to determine whether discovery of Mobil Land should precede any ruling on that entity's motion challenging the sufficiency of service. App. at 18a.

10. Mobil Land also bases its petition for certiorari on another significant misstatement of fact. Mobil Land asserts that "[p]laintiffs did not appeal the district court's determination that none of their efforts to make service directly on [Mobil Land] in Virginia and New York had been effective." Mobil Land Petition at 10 n.4. In fact, the plaintiffs' notice of appeal clearly stated that the ap-

peal was from both the district court's May 22, 1987 order and its October 13, 1988, final judgment in which the court made that specific determination. Moreover, in response to Mobil Land's motion to dismiss the appeal, the plaintiffs fully briefed for the court of appeals why the district court was incorrect in finding that proper service had not been effected directly on Mobil Land. Contrary to Mobil Land's suggestion to this Court, if review were granted, this Court would be called upon to review the question whether any of plaintiffs' four attempts to serve Mobil Land directly was valid and, in the alternative, whether plaintiffs should be allowed to attempt service again because of Mobil Land's refusal to accept service by mail.

11. The petition for review of Marvin J. Gerstin and Marvin Gerstin Associates, Inc. ("Gerstin") incorrectly claims that this case presents the issue whether the court of appeals lacked jurisdiction because plaintiffs allegedly failed to file a timely notice of appeal. It is undisputed that plaintiffs filed their first notice of appeal in a timely manner from the district court's original May 22, 1987, Opinion and Order. Gerstin Petition at 6. Thus, even if the court of appeals erred in holding that plaintiffs' first appeal was premature with respect to the Gerstin case, that would not create a jurisdictional defect since the plaintiffs did timely appeal. Because the plaintiffs filed a timely notice of appeal from each of the two orders of the district court, the circuit cases cited by Gerstin as allegedly in conflict have no relevance to this case.

12. Finally, the most misleading aspect of the Colonial and Gerstin petitions is their failure to inform the Court of the directly applicable regulations of the United States Department of Housing and Urban Development reproduced at the beginning of this opposition brief. 24 C.F.R. § 109. As discussed *infra* at pages 10-14, those regulations expressly interpret Section 804(c) to prohibit the use of human models in housing ads to indicate racial exclusiveness and directly support respondents' claims here.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE HOLDING OF *HAVENS* AND PROPERLY UPHELD THE SUFFICIENCY OF PLAINTIFFS' ALLEGATIONS

The D.C. Circuit faithfully applied this Court's holding in *Havens Realty Corp v. Coleman*, 455 U.S. 363, 380-381 (1982), in concluding that plaintiffs' allegations of a continuing violation of the Fair Housing Act were not time-barred. Given the federal regulations interpreting the Fair Housing Act to support the viability of plaintiffs' claims and the lack of any contrary circuit precedent, the court of appeals' unexceptional application of controlling precedent presents no issues worthy of review in this Court.

A. The D.C. Circuit Correctly Applied *Havens*

In *Havens* this Court directly addressed the question of how the statute of limitations should be applied to claims under the Fair Housing Act challenging "a continuing violation manifested in a number of incidents." 455 U.S. at 381. Recognizing that a "continuing violation" of the Fair Housing Act should not be treated in the same manner as one discrete act of discrimination, this Court held that

> where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Id. (footnote omitted).

As the court of appeals correctly recognized, a *Havens*-type "continuing violation" was alleged in this case. Plaintiffs here have challenged defendants' continuing practice of excluding black persons from pictures portraying residents in their real estate ads, manifested in

an uninterrupted series of all-white advertisements published weekend after weekend for many years. Application of the *Havens* rule to the facts here compelled the court of appeals' conclusion that plaintiffs' complaints were timely: "In each case, the last of the long stream of all white ads, plaintiffs allege, occurred within the 180-day zone . . .; thus, under the " 'continuing violation'/'last asserted occurrence' theory that the Supreme Court has advanced, . . . the plaintiffs claims are not time-barred." App. at 20a (footnote omitted).

Notwithstanding this Court's controlling precedent in *Havens*, petitioners contend that the result required by *Havens* is somehow inconsistent with the Court's decision in *Lorance v. AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989). That decision, however, is inapposite. *Lorance* held only that a plaintiff who seeks to assert a claim that is "wholly dependent on discriminatory conduct occurring well outside the period of limitations . . . cannot complain of a continuing violation." 109 S.Ct. at 2267. Here, to the contrary, plaintiffs have identified specific, concrete "discriminatory acts" that occurred within that period—the publication of one or more of a long-running series of racially exclusive ads. As *Havens* itself recognized, the entire continuing violation does not have to occur within the limitations period but rather only "the last asserted occurrence of that practice." 455 U.S. at 381.

B. Plaintiffs' Discriminatory Advertising Claims Are Plainly Sufficient To Survive A Motion To Dismiss

Petitioners have erroneously suggested to this Court that the court of appeals lacked any legal authority or precedent when it interpreted Section 804(c) of the Fair Housing Act to prohibit the use of human models in housing ads to indicate a racial preference. *See* Colonial Petition at 15-20; Gerstin Petition at 16-18. In fact, that decision had ample legal authority, both in the HUD regulations and the case law. The court of appeals did

nothing more than allow plaintiffs' claims to proceed on the uncontroversial premise that a reasonable jury could find that the consistent exclusion of black human models from real estate advertising in a metropolitan area over one-fourth black indicates a racial preference.

Petitioners failed to advise this Court that since 1972 the United States Department of Housing and Urban Development has expressly interpreted Section 804(c) to apply to the use of human models in real estate advertising. *See* 37 Fed. Reg. 6700 (1972). In 1980, after notice and comment, HUD reissued its advertising guidelines as formal regulations in order to help fulfill "the recognized need for a regulatory scheme to interpret and implement the Fair Housing Act of 1968." 45 Fed. Reg. 57,102 (1980). Those regulations provide that human models "may not be used to indicate exclusiveness on the basis of race [or] color" and "should be clearly definable as reasonably representing majority and minority groups in the metropolitan area." 45 Fed. Reg. 57,107 (1980), *codified at* 24 C.F.R. § 109.30(b); *see also* 24 C.F.R. § 109.25(c) (discussing examples of the discriminatory use of human models in violation of Section 804(c)). *See generally* Note, *Advertising and Title VIII: The Discriminatory Use of Models in Real Estate Advertisements*, 98 Yale L.J. 165, 169 (1988) (concluding that HUD regulations "clearly put housing advertisers on notice that section [8]04(c) regulates the use of human models in real estate advertisements").

Because HUD is "the federal agency primarily assigned to implement and administer" the Fair Housing Act, its "interpretation of the statute ordinarily commands considerable deference." *Gladstone*, 441 U.S. at 107; *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972). The statutory language of Section 804(c) broadly prohibits all forms of racially discriminatory advertising practices and makes no exception for the use of discriminatory pictures. Given that

the Fair Housing Act must be construed broadly to effectuate Congress' purpose to provide "for fair housing throughout the United States, 42 U.S.C. § 3601, it is clear that HUD's interpretation of Section 804(c) to apply to the discriminatory use of human models is reasonable and not contrary to clear congressional intent, and thus must be followed here. *Ragin v. The New York Times Co.*, 726 F. Supp. 953, 958-959 (S.D.N.Y. 1989) (holding that HUD regulations clearly support plaintiffs' claims that all-white advertising practices violate the Fair Housing Act), *appeal pending*, No. 90-7389 (2d Cir.); *Ragin v. Steiner, Clateman and Assocs.*, 714 F. Supp. 709, 713 n.3 (S.D.N.Y. 1989). *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Petitioners also unjustly criticize the court of appeals for following the well-settled and unremarkable view that the legal standard in Section 804(c), prohibiting "any" type of real estate advertising that indicates a racial preference, should generally be applied on a case-by-case basis by the factfinder based on the reasonable reader's interpretation of the specific advertising at issue. Because the petitioners apparently object to the breadth of the standard chosen by Congress in Section 804(c), they believe the courts must impose non-statutory restrictions on their liability, such as a showing of discriminatory intent, to avoid chilling their purported First Amendment right to publish lucrative real estate ads that exclude black models.

This Court, however, has already squarely rejected such a First Amendment argument. In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), this Court upheld, over the newspaper's First Amendment challenge, an employment discrimination ordinance that prohibited newspapers from carrying "help-wanted" advertisements in sex-designated columns. The Court found that such an advertising format "signaled" that the advertisers were "likely" to show an il-

legal preference in hiring, even though the ads were discriminatory only by "implication" and not "overtly." 413 U.S. at 387-389. Just as the Court found that the employment advertising published in sex-designated columns could lead readers to believe that they would be discriminated against if they were to apply for the advertised positions, so here the all-white advertisements used by petitioners send a "signal" to readers that they are "likely" to encounter illegal discrimination if they visit the complexes advertised.

Moreover, petitioners forget that their ads are merely commercial speech. As the Court has recently emphasized, " 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees v. Fox*, 109 S.Ct. 3028, 3033 (1989). For this reason, petitioners' arguments based on the alleged "chilling effect" of prohibiting racially exclusive human model advertising are of no moment when applied to commercial speech. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) ("Since advertising is the *sine qua non* of commercial profits, there is little likelihood of it being chilled by proper regulation and foregone entirely."); *see also Riley v. Nat'l Federation of the Blind of North Carolina*, 487 U.S. 781, 796 n.9 (1988) (noting that "[p]urely commercial speech is more susceptible to compelled disclosure requirements").

Even if the commercial speech at issue here were deemed to promote lawful activity rather than unlawful discrimination in housing, such speech could still be restricted as long as the government's interest were substantial and the restriction imposed reflected a reasonable fit between the legislative goal and the means chosen to accomplish that objective. *Fox*, 109 S.Ct. at 3035.

Of course, the government's interest in the prevention and elimination of racial discrimination in housing is not merely "substantial," but "compelling." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-444 (1968). Section 804(c) and HUD's implementing regulations directly advance that compelling interest by outlawing real estate advertising indicating a racial preference in the selection of tenants or buyers, and are thus consistent with the First Amendment.

Nor is there any authority for petitioners' complaint that the reasonable reader standard adopted by the court of appeals is too vague under the First Amendment. Just last Term, this Court held that even with respect to an editorial in the newspaper, the legal standard for determining whether the newspaper is liable for defamatory opinions is "whether reasonable readers would have actually interpreted the statement as implying defamatory facts." *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2710 n.3 (1990) (Brennan, J., dissenting) (stating unanimous aspect of decision); *id.* at 2707 (majority opinion) (test is whether statement "reasonably implies" defamatory facts or contains "false connotations"). This reasonable reader standard, which newspapers must follow in publishing opinions about matters of public concern, is no more standardless or difficult to apply than the reasonable reader standard applied by the court of appeals to determine liability for commercial speech.

II. THE INTERLOCUTORY DECISION BELOW REMANDING THE CASE FOR DISCOVERY AND TRIAL IS NOT WORTHY OF SUPREME COURT REVIEW BECAUSE NEITHER THE FACTUAL RECORD NOR THE LEGAL ISSUES HAVE BEEN PROPERLY DEVELOPED

Having lost their narrow statute of limitations defense on appeal, petitioners now ask this Court to consider statutory and constitutional issues under the Fair Housing Act that were not addressed by the court of appeals and that may be unnecessary to resolve. Because the court of appeals merely remanded the case for discovery and trial, there is no reason for this Court to consider this case at this time, especially when there are no contrary circuit precedents.

Reluctance to review interlocutory decisions is a time-honored principle followed by the Court in exercising its discretion to grant certiorari. Absent "extraordinary inconvenience and embarrassment in the conduct of the cause," this Court has traditionally declined to review decisions that do not finally resolve the litigation. *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). Lack of finality is often by itself "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, for example, the Court denied certiorari in *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967), "because the Court of Appeals remanded the case, [and] it is not yet ripe for review by this Court."

The general rule against Supreme Court review of interlocutory decisions is especially compelling here because the petitioners raise constitutional issues which should not be ruled upon unless the case cannot be resolved on any other grounds. *See, e.g., Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-569 (1947); *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis,

J., concurring). Not only may the constitutional issues become moot after trial, but this Court would not have the benefit of the prior consideration of the issues by a court of appeals if it now grants certiorari. The D.C. Circuit did not even address petitioners' First Amendment issues, while petitioner Colonial relegated its discussion of those issues to a single footnote in a 48-page brief on appeal.

Interlocutory review at this time would also deprive this Court of an adequate factual record. As noted above, there has not yet been any discovery and only the most preliminary facts are in the record concerning defendants' advertising practices.

Finally, this Court should deny certiorari in this case to give the Second and Sixth Circuits an opportunity to rule in the similar cases now pending in those jurisdictions. *See Ragin v. The New York Times Co.*, 726 F. Supp. 953 (S.D.N.Y. 1989), *appeal pending*, No. 90-7389 (2d Cir.); *Housing Opportunities Made Equal v. The Cincinnati Enquirer*, 731 F. Supp. 801 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir). Even if there were a need for this Court to consider the issues raised by petitioners, the Court should allow the lower courts time to consider those issues first. *See, e.g., Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., commenting on a denial of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.").

CONCLUSION

For the foregoing reasons, this Court should deny the pending petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: November 1, 1990